APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-86

UNITED STATES OF AMERICA,

Petitioner,

—v.—

FORREST S. TUCKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED FEBRUARY 24, 1971
CERTIORARI GRANTED MAY 3, 1971

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MARILYNE JUDSON

a witness called by and on behalf of the United States, being first duly sworn, was examined and testified as follows:

THE CLERK: Please state your name, your address and occupation to the Court and to the jury.

A. Marilyne Judson.
Q. Your address?
A. 1818 Walnut Street.
Q. Your occupation?
A. Teller.
Q. Bank teller?
A. Teller.

DIRECT EXAMINATION

MR. KARESH: Q. Is it Miss or Mrs. Judson?
A. Mrs.
Q. By whom are you employed?
A. First Savings and Loan Association, Berkeley.
Q. California?
A. Berkeley, California.
Q. And how long have you been so employed with that company?
A. Now, I have been employed about a year and a half.
Q. Calling your attention to December 7, 1951, you were in the employ of this—what is it, the Federal—
A. First Savings and—
Q. Federal—
A. Federal First Savings and Loan Association.
Q. We will call it a bank?
A. Bank. All right.
Q. Just to make it simpler.
December 7, you say you were employed, 1951?
A. That's correct.

Q. How long did you work for the bank prior to that time?

A. Since September.

Q. What were your duties on December 7, 1951?

A. I was teller in the bank.

Q. Were you on duty December 7, 1951?

A. That's correct.

Q. I am going to show you a—Well, you tell me what that is, it is U. S. Exhibit 2 for identification.

A. This is our cash box that we keep coin and cash bills in.

Q. You keep both coins and cash?

A. Coins and cash—bills, yes.

Q. Calling your attention to December 7, 1951, did you see this box?

A. Yes.

Q. Where did you see it?

A. It was on a truck that we used—we keep all our records in that and—that we put in the vault every night.

Q. You wait on the counter as a teller?

A. Yes, I do.

Q. And do you have grill work over the counter or not?

A. No, there is no grill.

Q. It is just a—

A. About a foot of glass.

Q. The counter is about how high, as high as this lecturne here?

A. Yes, that's correct, just about that height.

Q. Then there is a glass that goes up from the counter?

A. That's correct.

Q. And how large is this glass or how high is it?

A. About a foot.

Q. You don't have any cage or anything?

A. No cage at all.

Q. Calling your attention to December 7, 1951, did anything unusual happen on that date?

A. Yes. The bank was held up.

Q. What time did the holdup take place?
A. About 12:45.
Q. Are you certain of the time or is that to the best of your knowledge?
A. That is to the best of my knowledge. I know it was somewhere around there.
Q. Tell us in relation to that holdup what happened.
A. I had just come back from lunch and I had just opened my cash drawer.
Q. Now, incidentally, when you came back from lunch and you opened up your cash drawer, were there any other employees in the bank?
A. Yes, there were four of us.
Q. And who were the other three?
A. Mrs. Macoskey, Mrs. Starnes, and Mrs. Wegner.
Q. Now, you were telling us about opening up the cash drawer, what is a cash drawer?
A. Yes, I unlocked it.
Q. Is that under the counter?
A. Yes, it is.
Q. When you opened up the cash drawer where was this cash box?
A. That was on the truck, about three feet in back of our drawer.
Q. Could someone leaning into the cage, just leaning into the cage now, with the feet on the floor, on the opposite side where you were, could they touch this cash box?
A. No, they couldn't.
Q. Go on, tell us what happened.
A. And a man came into the office and asked for nickels, two rolls of nickels.
Q. I can't hear you.
A. A man came into the office and asked for two rolls of nickels. I waited on him and gave him the change.
Q. Now let me ask you this: Had you seen this man at any time prior to the time he came in and asked you for the change, that is, give him change for nickels, or with nickels?
A. Yes, I had, two days previous.

Q. Did you see him on more than one occasion prior to December 7?

A. Yes.

Q. How many times prior to December the 7th?

A. Twice.

Q. What dates were they, if you remember?

A. It was the 5th and the 6th of December, Wednesday and Thursday.

Q. 1951?

A. 1951.

Q. Now, do you recall whether or not the man wore a hat?

A. Yes, he did.

Q. On one of the occasions or on all of the occasions?

A. On all of the occasions.

Q. Could you see his eyes?

A. Yes I could.

Q. Tell us what happened on December 7th. Now you are opening the box, the cash drawer, and giving him nickels. What else happened?

A. And he put the nickels into a brief case.

Q. Did he have a brief case?

A. Yes, he did.

Q. Go ahead, ma'am.

A. And he came over the counter.

Q. What do you mean, "he came over the counter"?

A. He put his knee up on the counter and his hand and just came right over and said, "This is a holdup."

Q. He vaulted over the counter?

A. Yes.

Q. Were the other girls there?

A. Yes, they were.

Q. Did he have anything in his hand?

A. Not at the time—well, he had his brief case in his hand as he was coming over the counter. When he got over, he showed us a gun.

Q. Now you say he showed you a gun. Where did he get the gun from?

A. Well, it looked like it was in his belt. I'm not sure because he had his back to me.

Q. And he showed you a gun?

A. Yes.

Q. And the other girls, were they nearby when he showed you the gun?

A. Yes.

Q. Do you recall the type of gun it was, or don't you?

A. I don't remember.

Q. In any event, it was a gun.

A. It was a gun.

Q. And what did he say?

A. When—

Q. When he showed you the gun what did he say?

A. He said, "This is a holdup," and he told us to get into the vault.

Q. Before he told you to get into the vault did he do anything, or don't you remember?

A. I don't remember.

Q. He told you to get into the vault?

A. He told us—I don't know the exact words, but it was for us to get into the vault.

Q. Did you get into the vault?

A. Yes, I did.

Q. And did the other girls get into the vault?

A. Yes.

Q. Did he tell you to stand or sit down or give you any instructions?

A. He told us to sit down.

Q. Did you sit down?

A. We didn't really sit. We sort of squatted down.

Q. Did you observe him when you were inside the vault?

A. Yes.

Q. At any time did this man—at any time did this man take any money?

A. Yes, he did.

Q. Did he touch this, open up this box, U. S. Exhibit 2 for identification?

A. Yes, he did.

Q. Was the box locked or did he get a key or do you know?

A. It was locked and he got the key for it.

Q. And do you know where the key was that he got?
A. Yes sir, I do.
Q. Where was it?
A. It was in a little drawer alongside of the teller.
Q. Do you recall whether you were inside the vault or outside the vault when he opened up the box?
A. We were going to the vault, I recall.
Q. What did you see him do in relation to this box?
A. He took it off the truck and put it over by the teller-s window.
Q. Go on.
A. And unlocked it.
Q. Were there any other customers in the bank at the time?
A. No, there weren't.
Q. Any male employees in the bank?
A. No.
Q. Go on, what did he do in relation to the box?
A. Then he opened it and took the bills out of it.
Q. Did the box contain both bills and coins?
A. Yes, it did.
Q. Did he take any coins, if you know?
A. Not that I recall.
Q. Were there any bills left after this man left the bank, in the box?
A. In the box, no.
Q. Did you observe him touch any cash drawers?
A. Yes, he touched both our cash drawers.
Q. Did he take anything from the cash drawers?
A. The bills.
Q. And who is the man, if you know, that held you up with the gun that day?
A. It was Mr. Tucker.
Q. Do you recognize Mr. Tucker in the courtroom?
A. Yes, I do.
Q. Will you point him out to the Court and the Jury?
A. He is the gentleman in the blue suit there, with the tie.
Q. Which gentleman in the blue suit?
A. It's the second man back.

MR. KARESH: Let the record show the witness has identified the defendant, Your Honor.

THE COURT: Yes, the record will show.

MR. KARESH: Q. Are you positive—

THE COURT: The man you identified is the second man seated at the counsel table, is that correct?

THE WITNESS: That's correct.

THE COURT: There isn't any question in your mind about it?

THE WITNESS: No question at all.

MR. KARESH: Q. That was the man?

A. That's right.

Q. And thereafter did you call the authorities?

A. I called the—No, I didn't myself, no.

Q. Someone did?

A. Yes, Mrs. Wegner did.

Q. Who is Mrs. Wegner?

A. Mrs. Wegner.

Q. Oh, after the holdup, the man left the bank?

A. Yes, he did.

Q. Did he put any money in the briefcase?

A. He put all of his bills in the briefcase.

Q. Did he run from the bank?

A. No, he didn't.

Q. Did he vault back over the counter or walk out some side door?

A. No, he walked—he walked down the length of the —where—behind the teller's cage, and went out a swinging door and just walked out.

Q. And then the officers came?

A. That's correct.

Q. All this took place in Berkeley, California, December 7th, 1951?

A. That's correct.

MR. KARESH: That is all.

* * * *

ETHEL M. STARNES,

a witness called by and on behalf of the United States, being first duly sworn, was examined and testified as follows:

THE CLERK: Please state your name, your address, and your occupation to the Court and to the Jury?

A. Ethel M. Starnes.
Q. Your address?
A. 836 Collie Hill Drive, Walnut Creek.
Q. Your occupation?
A. I am a bookkeeper.
Q. Bank bookkeeper?
A. Yes, sir.

DIRECT EXAMINATION

MR. KARESH: Q. For whom were you employed as a bookkeeper?

A. First Savings and Loan, in Berkeley.
Q. Berkeley, California?
A. Berkeley, California.
Q. How long have you been so employed?
A. One and a half years.
Q. Were you so employed on December 7, 1951?
A. I was.
Q. Do you have access to the cash there?
A. Yes, sir.
Q. Do you have a cash box?
A. Yes, sir.
Q. Let me show you U. S. Exhibit 2 for identification and ask you if that is your cash box? Would you look at it?
A. Yes.
Q. Does that have your name on it or—
A. Just the "B" teller. That was mine.
Q. You are the "B" teller?
A. Yes, sir.
Q. Your duties comprise bookkeeper as well as teller?
A. I am now the bookkeeper. I am no longer a teller.
Q. But you were a teller then?

A. I was.

Q. And was this cash box in the bank—we will call it a bank—on December 7, 1951?

A. Yes, sir.

Q. Did it have any money in it?

A. Yes, sir.

Q. Did it have bills as well as coins?

A. Yes, sir.

Q. Calling your attention to December 7, 1951 again, was the bank held up?

A. Yes, sir.

Q. Were you there when the bank was held up?

A. Yes, sir.

Q. Do you recall about what time it was?

A. It was shortly after 12:30.

Q. How do you fix the time?

A. I was just about to go to lunch.

Q. Is that your lunch time?

A. Yes, sir.

Q. Who else was in the bank at that time?

A. Mrs. Judson, Mrs. Wegner, and Mrs. Macoskey.

Q. Any customers in the bank?

A. No, sir.

Q. Tell us about this bank holdup, tell us what happened, what you observed, what you saw, what you did, what the others did, if you know.

A. Well, I was sitting at my desk at the time.

Q. Would you talk to the Jury, please, ma'am.

A. I was sitting at my desk at the time, and this man came in and asked Mrs. Judson for some nickels, rolls of nickels.

Q. Let me interrupt and ask you this: How far away from Mrs. Judson were you?

A. About three feet.

Q. Did you hear the conversation about the nickels?

A. Yes, sir.

Q. Go on, ma'am.

A. And so he got the nickels—she got the nickels for him and gave them to him, and he—

Q. Where was he and where was she in relation to the counter?

A. He was right in front of her on the other side of the counter.

Q. She was inside the—we will call it inside the enclosure.

A. Yes, sir.

Q. Tell us what happened.

A. He put the nickels in his briefcase and as he jumped over the counter he said, "This is a stickup," and he came and jumped over.

Q. Ma'am, I'm sorry, but I can't hear a word you say. I'm very sorry.

A. He put the nickels in the briefcase.

Q. Did he put the nickels in the briefcase as he vaulted over the counter?

A. No, he put them away first.

Q. All right, go on. Well, could you see over the counter to see that he put the nickels in the briefcase?

A. Well, he had the briefcase up in front of him.

Q. Go on.

A. And as he started to jump over the counter, he said, "This is a stickup."

Q. Well, before he hit the floor?

A. Yes, sir.

Q. Or do you remember?

A. Yes, sir.

Q. Did he have anything in his hand other than the briefcase?

A. When he got on the other side of the counter he showed us the gun.

Q. What did he say when he showed you the gun; anything?

A. Nothing that I remember.

Q. I can't hear you.

A. Nothing that I remember.

Q. He said, "This is a stick-up," or "a hold-up," you say?

A. I think he said, "This is a stick-up."

Q. And he had the gun in his hand?

A. He showed us the gun, yes.

Q. Where did he take the gun from, do you remember?

A. I don't remember.

Q. But you saw it?
A. Yes.
Q. What else did he say and what else did he do?
A. He opened up my cash drawer and started taking money out, and I just sat there, and finally he said for all of us to go back to the vault.
Q. Did you go back into the vault?
A. Yes, sir.
Q. What about this cash box, did he do anything in relation to the cash box?
A. He took my key out of the little drawer that I have beside my cash box.
Q. Do you know how he knew your key was in the drawer beside the cash box?
A. Yes, sir, because I had waited on him the day before, for nickels.
Q. Had you opened up the cash box the day before with the key?
A. Yes, sir.
Q. Had you seen him on an occasion other than the day before December 7th?
A. Just the day before December 7th, is all.
Q. You waited on him?
A. Yes, sir.
Q. And you saw him the next day, December 7th?
A. Yes, sir.
Q. Now, did you see him take anything out of the cash box?
A. Well, he took the money out of the cash box.
Q. Well, what was in the cash box, what kind of money, bills, coins, checks, what, do you know?
A. There was coin on the bottom of the cash box and bills on top.
Q. Did he take the bills?
A. Yes, sir.
Q. Did he take any of the coins?
A. Not that I know of, sir.
Q. You went into the vault?
A. Yes, sir.
Q. Did you sit down on the floor?
A. I squatted on the floor.

Q. Did the other girls go in with you?
A. Yes, sir.
Q. And who were they, now?
A. Mrs. *Judson* and Mrs. Wegner, and, after awhile, Mrs. Macoskey joined us.
Q. In the vault?
A. Yes, sir.
Q. Do you recall whether or not he was wearing a hat?
A. Yes sir, he was wearing a felt hat.
Q. Do you recall how this person was dressed, other than the description of the hat?
A. No, sir. He had on a suit, though.
Q. Are you positive, or do you know?
A. Some coat.
MR. RUST: What was the answer, did he have on a suit?
MR. KARESH: Q. First I asked you, do you know how he was dressed. I asked you whether he wore a hat, and you said that he did. I asked you now if you know how he was dressed and I think you said you don't recall, and now you said a suit, now.
Will you tell us how, if you know, how he was dressed other than a hat?
A. I couldn't give a detailed description, no.
Q. Did he have a coat on?
A. Yes, sir.
Q. And you went into the vault, is that right?
A. Yes, sir.
Q. And did you observe him leave the bank?
A. Yes, sir.
Q. Where did he go, how did he get out of the bank?
A. He walked back towards the vault and out through the little door, out the front door.
Q. Where was this cash box when he handled it, this man handled it?
A. It was on a little—well, we call it a wagon, that we push in and out of the vault at night, and we keep it on this wagon.
Q. Could anyone have leaned over the counter and touched that box there without coming across the counter?

A. No, sir.

Q. Who was the man, if you know, that held up the bank with that gun that day and took the money?

A. I didn't know his name then, sir.

Q Well, do you recognize him in the court room?

A. Yes, sir.

Q. Will you point him out to the members of the Jury and to His Honor, the Judge?

A. He is sitting right down there.

Q. You say he is sitting right down there. There are four people sitting there. Which one do you mean?

A. Right across from Mr. Poole.

Q. Well, come down and point him out.

A. That man, there.

Q. Which one, Mr. Rust or that man?

A. This one, this one right—

Q. Will you touch him, please.

MR. RUST: We will stipulate she indicates the defendant.

MR. KARESH: Thank you.

Q. Did you ever see this Wanted Notice before?

A. Yes, sir.

Q. I haven't even shown it to you.

A. Yes sir, I have.

Q. When did you first see it?

A. I don't remember the date that I saw it.

Q. Was it before the bank robbery, after the bank robbery, in March of this year, April, January?

A. I don't know if it was in March or April.

Q. Of what year?

A. This year.

Q. Have you ever seen Mr. Tucker's, the defendant's, picture in the paper, the newspapers?

A. Yes, sir.

Q. Did you see his picture in the newspapers prior to the time you saw that or after?

A. I saw this first, sir.

Q. All right.

Now tell me the circumstances under which you saw that?

A. These pictures come in the mail.

Q. You mean these pictures—those types of pictures?
A. This type of picture.
Q. Tell us—
A. It was put on my desk.
Q. Go on.
A. And I looked at it and I said, "That's him."
Q. By "That's him," who do you mean?
A. That's the man that held us up.
Q. Whom did you tell that to?
A. I said it to Mrs. *Judson*, I believe.
Q. And then the local authorities were called in, is that right, the local police were called, is that right?
A. Mrs. *Judson* called.
Q. I can't hear you.
A. Mrs. Judson called the Berkeley police and Mrs. Macoskey called the FBI.
Q. And that's not a wanted notice for your bank robbery, is it, without saying what it is?
A. No, sir.
Q. That came in a routine fashion; as I understand it, you looked at it and said, "That's the man that held me up"?
A. Yes, sir.
Q. Are you positive that the man that you identified as the holdup man is the holdup man?
A. Yes, sir.
Q. Is there any question about it in your mind?
A. Not in my mind.
Q. Did he go through some of the drawers and take money out of them?
A. Both drawers.
Q. And, of course, the auditor came in and made a check of the missing amount, is that right?
A. That's right.
Q. Is that right?
A. Yes, sir.
Q. You testified that you saw a gun in the defendant's hand?
A. Yes, sir.
Q. That you are unable to identify the kind of gun?
A. Yes, sir.

Q. You are positive that it was a gun?
A. Yes, sir.

* * * *

MRS. ETHEL WEGNER,

called as a witness on behalf of the Government, being first duly sworn, was examined and testified as follows:

THE COURT: Would you indicate the identity of your next witness so the next witness may be in readiness. So that the attaches, after this witness, Mr. Garrett can call the next one.

That will give you, Mr. Garrett, an opportunity to advise the witness.

And now, ladies and gentlemen, we will take the afternoon recess, and the same admonition to you not to discuss the case under any circumstances nor to form or express an opinion until the matter has finally been submitted.

(Short recess.)

THE CLERK: Please state your name, address and occupation to the Court and to the Jury?
A. My name is Ethel Wegner.
Q. Your address?
A. 2267 Cedar Street, in Berkeley.
Q. Your occupation?
A. I am now the manager of the California State Employees Credit Union on the Campus.

DIRECT EXAMINATION

MR. KARESH: Q. On December 7, 1951—By the way, is it Miss or Mrs?
A. Mrs.
Q. On December 7, 1951, for whom were you working?
A. For the First Savings and Loan Association in Berkeley, the Berkeley office.
Q. Were you on duty that day?
A. I was.
Q. Did a holdup take place that day?

A. It did.

Q. Do you recall who was present when the holdup took place?

A. Yes. There were four women.

Q. Is that including yourself?

A. Including myself.

Q. Who were the ladies besides yourself?

A. Mrs. Marilyne Judson, Mrs. Ethel Starnes, Mrs. Vivias Macoskey, and myself.

Q. You were all employees of the association—we will call it the bank—at that time?

A. Yes.

Q. Tell us about the holdup that day, and tell me about what time it was that it happened.

A. It was about 12:30.

Q. How do you fix the time as 12:30?

A. Mrs. Judson, who was the teller, had just returned from lunch. Mrs. Starnes was about to leave for her lunch time. The man in question came to Mrs. Starnes' window—

Q. Did you observe him?

A. I did.

Q. Had you seen this man before that day, December 7?

A. On the two previous days.

Q. December 5th and December 6th?

A. Yes.

Q. And where?

A. In our office.

Q. On December 5th and December 6th—I am not speaking about December 7th—December 5th and December 6th, 1951, did this man ever go behind the counter?

A. No.

Q. Now go on with the events of December 7th.

A. Of December 7th?

Q. Yes.

A. Did you say December 7th?

Q. The holdup day.

A. Mrs. Judson had just finished waiting upon a loan customer and when she left—

Q. Was it a "she", the loan customer?

A. I'm very sorry, but I don't remember whether it was a man or a woman. I was at my desk doing my work.

Q. Go on. Was this customer in the bank when this holdup took place?

A. Yes. When the holdup took place?

Q. Yes.

A. I beg your pardon. The customer had left the building when the holdup took place.

Q. All right.

A. The man in question was the only one, besides the four women whom I have mentioned who were in the building at the time.

Q. Four women. You mean the three and yourself?

A. Three and myself.

Q. All right. Go ahead.

A. He came up to her window to ask for the roll of money that he had asked for previously on the two previous occasions.

Q. I don't quite understand what you mean previously or the two occasions. Would you just relate them, the events with this man as you remember?

A. Yes.

Q. All right.

A. Would you like me to tell you? It was his habit—

Q The jury is interested in the story. They want to hear the truth as best you can remember.

A. I will be glad to because I remember very distinctly that he had come in to ask for a roll of money.

Q. Go on.

A. For change. Which was not the custom in our type of organization for people to come in.

Q. You speak of custom in your type of organization. Have you discussed this matter with the other ladies?

A. I am just telling you why it was one of the reasons, that is, being this was not the usual thing.

Q. Can I ask you this, since leaving the room did you go out and speak to Mrs. Starnes and Mrs. Judson?

A. I talked to her, but not about this. I gave my word that I would not.

Q. Go on.

A. He came to the window to ask for the roll of money.

Q. Would you talk to the jury, ma'am.

A. When it was given to him—

MR. RUST: Now, just a minute. Excuse me. What day are we talking about?

A. We are talking about, right now I am talking about December 7.

MR. RUST: December 7. All right.

A. When the money was given to him, the roll of money, with the change—

Q. What do you mean the roll of money with the change?

A. The roll of money. There were two rolls of nickels and a dollar bill that was returned to him.

Q. In change—

A. For the five-dollar bill that he had given to the teller.

Q. Is this what Mrs. Judson told you or do you know that to be the fact?

A. I remember that.

Q. You were there and you saw it?

A. I was right there and I saw it. And suddenly he lept upon the counter—

Q. Could I interrupt—

A. —on top of the counter.

Q. How do you happen to remember this incident? Were you paying attention to this man?

A. I will be very glad to tell you because the first time that he came into our office I looked at him and I wondered why he particularly was in our office.

Q. What did he come in for the first time?

A. For the roll of money.

Q. And the second time?

A. Roll of money.

Q. You saw him three times?

A. I did, very definitely, because I knew he didn't belong there. That was the reason that he made the impression upon me. Why I felt that way, I don't know.

Q. Excuse me. What do you mean "didn't belong there"? I'm not speaking of the holdup.

A. Of course he didn't belong—not the holdup, to hold up the bank. I am telling you that was my impression when I first saw the man. He had no business in our—

Q. Don't people come in to change money once in a while?

A. Infrequently.

Q. Go on.

A. Yes.

Q. That is why you felt he had no right to be in there?

A. When I first saw him, I wondered why he was there. That was my immediate reaction to his presence in our building.

Q. Was he conducting himself in any suspicious or untoward way or anything?

A. No.

Q. You were just suspicious?

A. I was suspicious.

Q. From the first day he came there?

A. From the first day he came in.

Q. Go on, ma'am. By the way, on these three occasions was he without a hat?

A. No, he wore a hat.

Q. On all three occasions?

A. On all three occasions.

Q. You are positive of that?

A. Yes.

Q. All right. Go ahead.

A. We are back now to December the 7th?

Q. Yes, ma'am. You said something about "over the counter."

A. He lept over the counter, onto the counter and jumped down onto the floor.

Q. Did he have anything in his hand?

A. A briefcase, a new briefcase, a tan—it looked like leather, it may have been plastic, but it looked like leather.

Q. You remember he had a briefcase in his hand?

A. Yes.

Q. Did it have a handle on it?

A. Yes.

Q. Did you see him put anything in the briefcase?

A. The money out of the drawers, but first—

THE COURT: May I ask you to permit the witness, now that we have reached this point of continuity, to continue on uninterruptedly.

MR. KARESH: All right, Judge.

THE COURT: So that she may tell her own story, without any possible suggestion or any possible claim that there might be suggestion.

Go ahead.

A. He took out his gun, out of his—somewhere on his—

MR. KARESH: Q. Excuse me, I didn't mean to suggest, but I can see the witness—He took out this gun?

A. His gun.

THE COURT: Let the witness continue, Mr. Karesh.

A. Perhaps I'm not speaking clearly enough.

MR. KARESH: I won't interrupt you.

A. He took out a gun from his pocket and showed it to us and told us it was a holdup but not to do anything that would cause trouble.

THE COURT: Continue.

A. I, in a very agitated voice, told him, asked him what he was doing there, and told him he had no business to be there.

MR. KARESH: Continue, please.

A. He opened Mrs. Starnes' cash drawer, slipped through the checks, then he took out the currency and the rolled money and put it into his briefcase.

He went to the rack on which the ledger cards and on which—

MR. KARESH: Could I have the exhibits, please?

THE COURT: Continue, please.

A. —on which there were two coin boxes in which extra rolled money was kept. The coin box was—He brought the coin box back to the counter, took the key out of the drawer, opened it, took the money out of it, put it in his briefcase.

Then he proceeded to Mrs. Johnson's cash drawer.

MR. KARESH: Q. Where were you at that time?

A. Pardon me?

Q. Where were you at that time?

A. I was at my desk, right as close as from here to Mrs. Judson's counter, to perhaps the end of this desk.

Q. Go ahead, ma'am.

A. I was closer to Mrs. Starnes' counter.

Then he took the currency and the rolled money and the loose coin out of Mrs. Judson's cash drawer and told us then to get into the vault and to get down on the floor and not to get up until he left.

Q. Go ahead.

A. And we did exactly as he told us to do.

Q. What else happened after that?

A. When he was almost out the front door, then I went immediately to the telephone at my desk and called the police department.

Q. You have spoken about a cash box. Is this the type of cash box—Will you look at it, please?

A. Yes.

Q. Yes.

A. Yes.

Q. What did you do with this cash box?

A. He took the key out of the drawer, that is to the right of the cash drawer, opened it and removed it, removed the money.

* * * *

CROSS EXAMINATION OF FORREST TUCKER

MR. KARESH: Q. You admitted to Agent Poole, did you not, that that was your gun?

A. Yes, I did.

Q. Well, I thought you said you didn't want to answer any questions until you spoke to an agent. Why did you admit that that was your gun till you spoke to a lawyer?

A. When I was first picked up, they were questioning me about my name and so forth. They asked me if I had a gun, and I told them that I had a gun that I used to keep in the house for protection and my wife asked me to take it out of the house because she thought maybe the baby—we have a baby at home, a young child—would possibly get ahold of it. So I took it out of the house and put it in the glove compartment. When they asked me if I had a gun, I said, yes. I did not make

a statement that I had had it since 1951, since I have been out here, though.

Q. How long have you had it?

A. Approximately less than a year.

Q. How long?

A. Less than a year.

Q. Didn't you tell the agents you got that gun in Indiana?

A. No, I did not.

Q. Didn't you tell the agent that you stole that gun in Indiana when you were coming out to California?

A. I said I had taken the gun out of someone's glove compartment.

Q. Tell us about taking it out of someone's glove compartment.

MR. RUST: Object to that as irrelevant, immaterial, Your Honor, improper cross-examination.

MR. KARESH: He says that he had denied everything, that he wanted to speak to a lawyer.

MR. RUST: This type of testimony is highly prejudicial to this particular type of charge. It is certainly an improper cross-examination of the testimony that the defendant has given. In addition, it is irrelevant and immaterial.

THE COURT: Objection sustained.

MR. KARESH: Q. You said something about the records of the Walkup Drayage Company showed something. What did you mean by that?

A. It would show that the acquaintance that I had—in placing the date, in recalling the date of December the 7th, where I was at, the reason that I—. The reason that this comes to my mind as December the 7th that I was here in San Francisco is because of having lunch with this friend of mine on the first date he went to work, which the Walkup records will show was December the 7th, and it is the first day that he went to work for them. That is how.

Q. Have you looked at the records of the Walkup Company?

A. I have had it checked.

Q. You what?
A. I have had it checked.
Q. Who checked it for you?
A. An acquaintance.
Q. Who is that?
A. I believe Mr. Rust checked that record.
Q. I mean before that.
A. No one.
Q. Mr. Bellew was working for the Walkup Company on December the 7th?
A. Yes, he was.
Q. Since you have been arrested have you spoken to Mr. Bellew?
A. I have.
Q. On more than one occasion?
A. I have.
Q. Where did you talk to him?
A. In jail.
Q. And after you spoke to him you had the records checked?
A. After I spoke to him?
Q. Yes.
A. Why, of course. I asked him what day was it I met him first. He told me the sixth. I told him, "Well, in that case, you and I were having lunch on the following day. It definitely shows that I couldn't have been in Berkeley at the time because just by the fact that I had lunch with you that day."
Q. Had you ever had lunch with him on any other days?
A. Many days.
Q. Do you remember them?
A. Yes.
Q. Where were you January 31, 1952, were you with Mr. Bellew?
A. January 31, 1952?
MR. RUST: That is irrelevant and immaterial.
MR. KARESH: It is to test the credibility of the witness.
MR. RUST: It is not within any of the issues.
MR. KARESH: It goes to the credibility.

THE COURT: Objection sustained.

MR. KARESH: Q. Were you in the vicinity of the American Trust Company on that day?

MR. RUST: On which day?

MR. KARESH: January 31, 1952.

MR. RUST: Well, that is the objection that was sustained. Same objection.

MR. KARESH: Q. Have you ever been convicted of a felony?

A. Yes, I have.

Q. On more than one occasion?

A. Yes, I have.

Q. List them.

A. What?

Q. List them and for what.

A. Automobile thefts.

Q. Tell us all—more than one. You were convicted in Florida, were you not?

A. Yes, I was.

Q. For what?

A. Automobile theft, breaking and entering.

Q. What do you mean "automobile theft, breaking and entering"?

A. It boils down to this, I was 17 years old, broke into a man's garage, took his automobile, went joy riding in it, received a ten year sentence for it.

Q. At the age of 17 you received a ten year sentence?

A. Yes.

Q. When was that?

A. 1938.

Q. You broke into a place and stole a car?

A. Yes.

Q. What kind of car did you steal?

A. '36 Ford.

Q. Tell us about your other convictions.

A. 1946 I broke into a jewelry store.

Q. And where at?

MR. RUST: These are convictions, I take it, convictions limited to felonies? Otherwise I am going to object to it.

MR. KARASH: I mean felonies.

THE COURT: Are these convictions for felonies?

MR. KARESH: Yes.

Q. All right, sir, the next felony you are talking about.

A. Broke into a jewelry store.

Q. Where?

A. New Orleans.

Q. Night or day?

A. Night.

MR. RUST: I don't think, if the Court please, he is obligated or required to go into details of the conviction. I think the question is limited to whether he has been convicted.

MR. KARESH: Well, Your Honor, in the famous Alcatraz case I recall Mr. Hennesey went into the—not only whether he was convicted of a felony but the nature of the felony and the sentence secured, and the Circuit here has upheld it.

MR. RUST: I know of no case that holds that you can go into details of convictions. Do you have a case?

THE COURT: I think it would suffice for the purposes of this examination if you asked the question, put the question to the witness with respect to his prior convictions, and he has admitted two prior convictions—hasn't he?

MR. KARESH: Q. As a matter of fact, you have been convicted on three prior occasions?

MR. RUST: Now, here is the same objection to that word "convicted".

MR. KARESH: Q. Of felonies on three prior occasions. I have the right to ask that?

THE COURT: You have the right.

MR. KARESH: Q. Tell us about the third one, if there was one.

A. The third one—

MR. RUST: I think Your Honor, again this question must be limited to the conviction and the place, not the detail of evidence concerning that.

MR. KARESH: The defendant attempts to explain away this first one, Your Honor. He said that he was 17.

MR. RUST: Well, that was in response to your question. You can't complain about that.

MR. KARESH: All right, then I have the right to ask him the nature.

THE COURT: You have a certified copy of the transcript?

MR. KARESH: Yes, I have copies of the convictions. I would like to ask him about a conviction in Florida in 1950.

A. That is true.

Q. Armed robbery, wasn't it?

A. It was.

Q. So you have been convicted of three felonies, and one is armed robbery.

A. That's true.

* * * *

Q. Why did you use the name of Rick Bellew, if you did?

A. Because I was a fugitive from Florida.

Q. You were a what?

A. A fugitive.

Q. A fugitive from what?

A. I had been sentenced to a term in Florida for the third conviction that you just brought up, and while waiting transportation to prison I was given a chance to—nobody was watching me, and I walked off down there and came out to California.

Q. Where did you walk away from?

A. I was having my appendix removed in the hospital, before I was—

MR. RUST: I object, Your Honor.

MR. KARESH: He brought up the subject.

MR. RUST: It doesn't have anything to do with details—If he wants to explain why he was using the name, that's one thing.

MR. KARESH: He started, I didn't.

THE COURT: The objection is overruled. This is a voluntary statement.

* * * *

WEDNESDAY, MAY 20, 1953

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(Oral arguments in closing presented on behalf of the respective parties.)

(The Jury was thereupon instructed by the Court.)

(The Jury withdrew for their deliberations.)

(The verdict of the Jury was read and entered in open Court, finding the defendant guilty as to the charge in the indictment.)

(The Jury was excused.)

---oOo---

THE COURT: Do you have any motions?

MR. RUST: I have no motions.

THE COURT: Mr. Karesh, do you have anything to say?

MR. KARESH: Nothing, Your Honor. I would say, Your Honor, the Agent is present in Court.

THE COURT: I would like to have the Agent's testimony with respect to the prior convictions.

MR. KARESH: Perhaps, Your Honor, in order that counsel might protect the record—I make it only as a suggestion, Mr. Rust—Mr. Rust and I have been in many court matters together before—I would suggest, to protect the record, he make a motion now for a new trial, in arrest of judgment, all the statutory grounds—just as a suggestion. I don't know whether he wants to or not.

THE COURT: Counsel made motions during the course of the trial for judgment of acquittal. I denied all and singular said motions and are you advised now to make a motion?

MR. RUST: I personally see no point in making a motion for a new trial. It does not effect his after rights if he wants them one way or the other.

MR. KARESH: It might—

THE COURT: The motion in arrest of judgment equally would be without point.

MR. RUST: That's right.

THE COURT: And equally, Mr. Rust is fairly familiar with the practice of the Court. If he made a motion for probation, I would deny the motion.

MR. RUST: I understand that. I don't want to go through futile proceedings. That's it.

As a matter of fact, he has no eligibility for that anyway. If it were referred, it would only be a matter of making a report.

WILLIAM POOLE,

having been first duly sworn, testified as follows:

EXAMINATION BY THE COURT

THE COURT: Are you prepared, Mr. Poole, to tell the Court the convictions of the defendant from your record and sentences heretofore imposed in other districts in other cases?

A. Not right off-hand. I believe the certified copies are there. Don't you have your FBI—

THE COURT: Do you have a certified copy so that the witness' recollection may be refreshed?

(Document handed to witness)

THE COURT: You have your FBI record. The first conviction involved a matter wherein the defendant stated that he was a juvenile at the time.

MR. KARESH: Mr. Poole, would that appear in the amount of time served? Would that appear in the FBI report?

THE WITNESS: No. The FBI report does not reflect the time served. As the defendant said, when he was a juvenile, I believe it was in 1938, he received a ten-year sentence in Florida. Now, when we interviewed him as to the amount of time served, we have no way of knowing, but he said that he had served five years and four months on that particular one.

MR. KARESH: I was going to suggest, if there is any dispute, the defendant might so inform the Court through his counsel.

THE COURT: There isn't any dispute on his part. The dispute concerns itself as to whether or not he was a juvenile at the time. Was he a juvenile?

A. Well, he is, I believe, 32 years now, and that was the original sentence in 1938—that's approximately 14 to 15 years ago, and he would have been a juvenile, yes.

Then in 1946, I believe it was, in Florida—

THE COURT: What was the first offense, what is that first offense involved, was it a breaking and entering?

THE WITNESS: It was a grand larceny, breaking and entering. It had to do with the theft of a motor car.

MR. KARESH: I notice, Mr. Poole, from one of those convictions—it is attached—he was sentenced to 11 days at hard labor, or am I wrong?

THE WITNESS: Yes, that's a misdemeanor.

THE COURT: Could I glance at that sheet of paper?

(Document handed to Court)

MR. KARESH: Those documents that you showed His Honor, that has to do with the Florida convictions?

THE WITNESS: That's right.

MR. KARESH: Both the early one and the last one?

THE WITNESS: Yes. Those documents there contain the records of all of his convictions in the State of Florida.

MR. RUST: Mr. Poole, the defendant just informed me that he stated that he served five years and some months on the chain gang of a seven year actual confinement altogether.

THE WITNESS: That's probably correct. He said there was five years and four months on the chain gang. And the rest of the sentence on the first, and he said he actually served two years beyond that. Yes.

MR. KARESH: So he got that sentence as a juvenile. He was about 17 and he got that sentence?

THE WITNESS: Yes.

THE COURT: He had five years to run consecutively.

MR. KARESH: With relation to the recent conviction in Florida—His Honor has the Florida papers—what about that, the—before you go to the Louisiana one.

THE WITNESS: In 1950 Mr. Tucker was sentenced to a five year term in the State of Florida, for, I believe it was burglarly, and on January the 5, 1951, while in custody in the hospital, he escaped.

MR. KARESH: Now what about the Louisiana conviction?

THE WITNESS: In 1946 he was convicted in the State of Louisiana on a felony charge and given a term of 4 years.

MR. KARESH: Do you know how much of that he served?

THE WITNESS: Off-hand, I do not know.

MR. KARESH: What was that felony for, do you know?

THE WITNESS: According to this, it says here Article 62 of the Louisiana Criminal Code. It does not further describe that. However, I believe it was a burglary.

MR. KARESH: Has he got a family, do you know?

THE WITNESS: Yes, at the present time he is married. He was married, so he told me, in September of 1951, and at the present time he has a child approximately five or six months old.

MR. KARESH: Does he have parents alive, do you know? Do you know where he comes from or anything of his background?

THE WITNESS: Yes. His home is in Louisiana. He has a brother, I believe, in Arizona, and the rest of his folks are in Florida. I'm sorry, not Louisiana.

MR. KARESH: Does he have any military service of any kind or character?

THE WITNESS: Not that I know of.

MR. KARESH: Now he is presently, and I think Your Honor should know this, under charge, an indictment returned in the Southern District of California for bank robbery. Is that correct?

THE WITNESS: That's correct. According to information we received, the trial of Tucker and also Bellew

is set forth for June the 1st in Los Angeles in the Federal Court for bank robbery.

MR. KARESH: What kind of bank was it that they are charged with robbing?

MR. RUST: How could that be, when he hasn't pleaded.

MR. KARESH: I will tell you what happens. Bellew was here and Bellew was removed, and apparently—

THE COURT: Bellew testified in this case.

MR. KARESH: Bellew testified in this case, yes. Bellew is the man that testified. He was removed to Southern California to face that indictment. We did not take Mr. Tucker down because his trial was set here. Thereafter pursuant to writ of habeas corpus ad testificandum Bellew was brought back and apparently the court there has set the trial of Bellew, in anticipation of this trial being over by now. He will probably be brought down there for trial.

Now, he is a suspect in other robberies, without mentioning them?

THE WITNESS: Yes, he is, in this District here.

MR. KARESH: How many?

THE WITNESS: He is a suspect at the present time in four bank robberies in this area, and also in cases that the local police have, probably about seven or eight loan companies, over which there is no federal jurisdiction.

MR. KARESH: I say this, Your Honor, the reason I bring this out, is not because since he has been found guilty that that should be taken into account in increasing punishment, but I only tell you so that Your Honor will know that perhaps he will face other charges. But I do know that he has that indictment in California, in Southern California, and he will have to face trial.

THE COURT: These offenses in the main involve armed robbery, do they?

THE WITNESS: Yes. I would say that all of these robberies were with the use of firearms.

MR. KARESH: Wasn't there a shooting in one in Southern California?

THE WITNESS: The one in Los Angeles—

MR. RUST: Are you speaking about a recent one? You are not talking about the convictions?

MR. KARESH: No recent—

MR. RUST: On March the 6th, 1953, there was a bank robbery in Los Angeles and during the course of which several shots were fired by one of the men perpetrating the bank robbery and by a guard from the nearby insurance company that they attempted to stop the bank robbery. However, neither individual was injured.

MR. KARESH: But that is the trial coming up?

THE WITNESS: That's correct.

MR. KARESH: Has he ever had any gainful employment, do you know?

THE WITNESS: I would say to my knowledge, since his escape, he has had no gainful employment other than he, as he said, music arrangement and I believe he has indicated that when he first came to this area, he had several odd jobs around garages, such as washing cars and things of that nature. He has also indicated that he worked for several months in 1951 on tug boats in the Bay. So far that has not been verified.

MR. KARESH: Did he have any property when he was apprehended, any personal property or real property or money in the bank that you know of?

THE WITNESS: Yes, at the time he was apprehended, I would say as far as money is concerned, between what was found in several safe deposit boxes and on his person, there is approximately, oh, seven, eight hundred dollars. I'm not sure which.

MR. KARESH: And this automobile?

THE WITNESS: He had the automobile. Then he had, of course, the furniture in his apartment, and things of that nature. Also he had a 1940 Ford Car, which was more or less a hot-rod. He has been more or less a hot-rod driver, and he has told us that the equipment that is on that particular Ford probably makes that Ford worth between three or four thousand dollars.

MR. KARESH: Well, in relation to the automobile that you gentlemen found him in, how much does he owe on that car?

THE WITNESS: I believe the Lincoln that he had, as he testified, he had made the down payment with the Mercury, and at the time of his apprehension I do not believe he had made any further payments on it.

MR. KARESH: The Bureau has the car now or—

THE WITNESS: To my knowledge either the Bureau has it or it has been turned back to the legal owner, the Bank that financed it.

MR. KARESH: This gun that was found on the defendant, have they been able to trace it or anything like that?

THE WITNESS: No, at the present time we have been unable to trace it.

MR. KARESH: Could I ask counsel whether counsel has any objections to the Court entering an order turning this gun over to the Bureau?

MR. RUST: I don't know if I have any authority to make it.

MR. KARESH: All right. We will renew the request later.

Is there some section, Mr. Poole, that you know of—I should know that—that a gun allegedly used in a holdup can be confiscated?

THE WITNESS: I believe in the past it has been done by a court order, and it has been turned over to us.

MR. RUST: There is such a thing in the State procedure, but I am not familiar with it in the Federal.

MR. KARESH: There may be in the Federal.

THE WITNESS: Well, I would say this, that—

THE COURT: I recall in the Hall of Justice we always made an order of confiscation of guns. What happened to the gun thereafter was always problematical. At least we made an order.

MR. KARESH: We will ask for the order. If it is illegal, they can vacate it. The only thing is, assuming that the Court has the power to make the order, will counsel object to the withdrawing of the gun from evidence?

MR. RUST: I have no objection to withdrawing it from evidence.

THE COURT: Is there something unusual about this particular gun?

MR. KARESH: No. The Bureau has asked for the gun.

THE COURT: It is a Spanish make, is it?

THE WITNESS: When this particular gun was submitted to our laboratory in Washington for ballistic tests, when they returned it, they requested that we attempt to get a court order as they would like to have that gun in the laboratory for testing purposes in future cases.

THE COURT: For experimental reasons?

THE WITNESS: That's correct.

THE COURT: Under those circumstances, I think it is not out of order.

MR. KARESH: And the bullets, of course, that were taken—

THE COURT: The defendant will not have much use for it in the future.

MR. KARESH: I have no other questions.

THE COURT: Mr. Rust, do you have any questions?

MR. RUST: I have no questions, Judge. I am just wondering how much the Court should take into consideration of these pending charges—which the Court has no way of knowing the truth or falsity of.

THE COURT: I am not going to take into consideration in the matter of sentence the Los Angeles case because that will be dealt with appropriately. Either he will be acquitted or convicted.

Does the defendant have any questions to ask at all? You can ask through your attorney or individually.

MR. RUST: Do you want to ask Mr. Poole any questions?

THE DEFENDANT: No.

THE COURT: Do you know anything about the defendant's wife? Is she employed?

THE WITNESS: At the present time, she is unemployed, but I understand that his wife comes from a good background in the San Mateo area and apparently up to the time of Tucker's apprehension, she was unaware of his true identity and his activities and apparently she believed that he had a legitimate occupation.

THE COURT: And this child of five is a result of that union?

THE WITNESS: That is correct, yes.

THE COURT: She has relatives, has she?

THE WITNESS: Yes, she has.

THE COURT: Rather substantial people?

THE WITNESS: Yes. So our investigation indicates that they are. I believe at the time of his marriage, I believe they had a church wedding down at San Mateo.

MR. KARESH: They met out here?

THE WITNESS: That's right.

MR. KARESH: They met, without mentioning names.

THE WITNESS: That's correct.

MR. RUST: Do you want to ask Mr. Poole any questions?

THE DEFENDANT: I don't care to ask any questions, no.

THE COURT: Would you like to make any suggestion, Mr. Defendant, in your own behalf?

THE DEFENDANT: Yes. Well, I would like to make—there was a question of how much time I have done on sentences given to me. The record will show I have—I am not asking for anything that is not due me, but I would just like to point out that I had never been given probation, suspended sentence or parole on any sentence that has been handed down. I did seven years out of the ten that was given me, and the four in Louisiana, I did 45 months on it, and the five year sentence that was given me, I was convicted by a judge—the same judge that gave me the five, gave me the ten to start with, and I was innocent of—that's neither here nor there, but I mean he found me guilty and subsequently I escaped and came out here. Now, I have been found guilty today. So I stand guilty here.

THE COURT: How old were you when you first suffered a conviction—17?

THE DEFENDANT: Yes, sir.

THE COURT: These cases carry heavy penalties. You knew that when you started these enterprises, didn't you?

THE DEFENDANT: I understand it does carry a heavy penalty.

THE COURT: Do you know the reason underlying it?

THE DEFENDANT: Yes, sir.

THE COURT: There is no room for the Court to entertain elements of great sympathy because you were

armed on the occasion in question and you probably would have shot, had the occasion arose.

THE DEFENDANT: I have never been known to strike anybody, shoot anybody or harm anybody.

MR. KARESH: Could I ask the agent a question? Is there any evidence of violence in the past criminal record —I don't mean the bank robberies—any of these larcenies that you know of?

THE WITNESS: No. There is no actual shooting or anything of that nature.

THE COURT: How long has this association with Rick Bellew been going on, since 1951 and '52?

THE WITNESS: That would be my impression, but I believe they probably met first in the Louisiana penitentiary. Now then at the time that I interviewed Tucker, he told me that he first met Bellew in 1938, out here in California, and naturally later when he found out that he had served—he was serving a sentence down there, that that probably was not the truth, and I would say that after he left the Louisiana penitentiary, he probably did not see Bellew again until somewhere in December of 1950 or January of '51, because prior to that, Bellew was incarcerated in the California penitentiary. I believe that he was paroled out of the penitentiary somewhere around the latter part of 1950, and since that time I would say that he has associated with Bellew—but just how much, or whether it was social or just along with these various activities, I couldn't say.

THE COURT: Without disclosing whatever evidentiary matter might be at hand, does the defendant appear to be linked in more than several local felonies involving banks or loan companies?

THE WITNESS: I would say this, that on the local loan companies in the Oakland Area—

THE COURT: What kind of loan companies are they?

THE WITNESS: Well, they are like the Personal Finance Company, Guarantee Finance Company, loan companies of that nature. And I would say that the evidence against him is very similar, in effect, of what was presented here, on those particular cases.

THE COURT: Do have fingerprint testimony and the like?

THE WITNESS: I believe that there is, yes.

THE COURT: I take it you do not present these cases—you did not present these cases until you determined the fate of this particular case, is that the problem involved?

THE WITNESS: Well, these particular cases I am talking about are local—they are under the jurisdiction of the local police department and there is no Federal jurisdiction. Now I understand the District Attorney's office in Alameda County is waiting. What action they are going to take, I don't know.

THE COURT: I assume that whatever sentence is meted out to the defendant in the case at bar will be considered in connection with the prosecution or absence of prosecution of those cases.

THE WITNESS: I believe so.

THE COURT: All right. Do you have anything further?

MR. KARESH: No, Your Honor. Perhaps just one remark, that he did not strike anyone or shoot, did not hit anyone.

THE COURT: There is one count in the indictment?

MR. KARESH: Yes, Your Honor.

THE COURT: Under which the defendant Forrest Silva Tucker has been found guilty. The Jury in its findings has indicated that the defendant did knowingly, wilfully and unlawfully put in jeopardy the lives of the afore named employees of the Loan Association by the use of a dangerous weapon, to wit, a hand gun. Under such circumstances, Subdivision 2113(d) is applicable, providing for the term of 25 years.

Accordingly, Forrest Silva Tucker, are you ready for sentence?

THE DEFENDANT: I am.

THE COURT: It is the judgment and sentence of this Court that you be confined in a Federal penitentiary for the term of 25 years.

That is all.

(Thereupon the adjournment was taken.)

MEMORANDUM DECISION AND ORDER DENYING PETITIONER'S MOTION TO VACATE SENTENCE

GEORGE B. HARRIS, Chief Judge.

Forest Tucker was charged by indictment with having committed an armed robbery of the First Savings and Loan Association in Berkeley, California, on December 7, 1951. After trial by jury before this Court he was found guilty as charged on May 20, 1953. He was sentenced to serve a term of 25 years.

He has filed a motion herein pursuant to Title 28 U.S.C. § 2255 seeking to vacate said sentence after a lapse of 15 years. He contends that the sentence should be vacated for the reason that evidence of prior invalid convictions was referred to on cross-examination of the defendant during the trial for purposes of impeachment.

Tucker, in effect, urges that the rationale of Burgett v. State of Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed. 2d 319 (1967)[1] bars the use of felony convictions for *impeachment*, when those convictions were obtained in violation of the standards of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1961).

The United States Attorney has conceded that with respect to two of said prior judgments of conviction, the defendant was not informed of his right to the assistance of counsel and did not waive his constitutional right to be represented by counsel.[2] Respondent denies that petitioner was thus prejudiced and contends that the rule of *Burgett* has no application. Further, that it is not to be retroactively applied.

The Court has concluded:

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[1] "To permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense (see Greer v. Beto, 384 U.S. 269, 86 S.Ct. 1477 [16 L.Ed.2d 526]), is to erode the principle of that case." (p. 115, 88 S.Ct. p. 262)

[2] Findings and Judgment of Court in People of the State of California v. Forest Silva Tucker, #25174, Dept. 2, Superior Court of the State of California, In and for the County of Alameda.

(a) That the use of the constitutionally invalid prior convictions on cross-examination for impeachment purposes was error;

(b) That the error was harmless under the standards of Chapman v. State of California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The Factual Background

The evidence presented at the trial overwhelmingly supported the charge contained in the indictment. The Government's case in chief consisted of the following evidence:

Four employees of the Savings and Loan Association made in-court identification of Tucker as the man who had committed the robbery on December 7, 1951. These employees were:

1. Marilyne Judson [3] who, in addition to her in-court identification, testified that she had observed Tucker in the Association also on December 5, 1951 and December 6, 1951.[4] She further testified that Tucker touched a cash box in the course of the robbery,[5] and that the cash box could not be reached by a customer under normal circumstances;[6]

2. Ethel Starnes [7] who, in addition to her in-court identification, testified that she had observed Tucker in the Association also on December 6, 1951.[8] She further testified that Tucker took money from her cash box during the robbery.[9]

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[3] RT 27-50

[4] RT 31

[5] RT 34

[6] RT 30

[7] RT 51-69

[8] RT 56

[9] RT 56

3. Ethel Wegner[10] who, in addition to her in-court identification, testified that she had observed Tucker in the Association also on December 5, 1951 and December 6, 1951.[11]

Sebastian Latona,[12] Federal Bureau of Investigation fingerprint examiner with twenty-one years experience, testified that Tucker's fingerprint was found on the cash box which Marilyne Judson and Ethel Starnes had previously testified was touched by Tucker in the course of the robbery.

Howard Neuberg,[13] Special Agent for the Federal Bureau of Investigation, testified that Tucker claimed that his name was Rick Bellew when Neuberg arrested him.

William Poole,[14] Special Agent for the Federal Bureau of Investigation, testified that he interviewed Tucker after his arrest and that Tucker told him that he had never been in the First Savings and Loan Association in Berkeley. Poole also testified that Tucker told him that he had owned the gun found in the car since February, 1951.

Tucker's defense was based on his own testimony and that of his friend Rick Bellew, whose name Tucker had used when arrested. Rick Bellew testified that he was having lunch with Tucker in San Francisco at the time when the robbery occurred.[15] On direct examination, Tucker denied that he told Special Agent Poole that he had never been in the First Savings and Loan Association in Berkeley,[16] claimed that he had been there on December 5, 1951,[17] and claimed that he was having

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[10] RT 70-95

[11] RT 72

[12] RT 116-145

[13] RT 16-20

[14] RT 112-115

[15] RT 197-205

[16] RT 156

[17] RT 156

lunch with Rick Bellew at the time of the robbery.[18]

On cross-examination, Tucker claimed he had owned the gun found in the car for only one year, and denied making a contradictory statement to Special Agent Poole. Tucker committed himself to the position that he had touched Ethel Starnes' cash box while it was on the counter, and had touched the box only one time.[19] Tucker claimed that much of the money on which he was living was obtained by writing songs for various persons, but he refused to disclose the names of any of those persons.[20]

On rebuttal, Tucker's story was thoroughly discredited, and hence his credibility impeached, by further testimony from fingerprint expert Latona, and Savings and Loan Association employee Ethel Starnes. Latona testified that Tucker's same fingerprint was found in two places on the cash box, thereby discrediting Tucker's story that he had touched it only one time.[21]

The Error Was Harmless Under the Standards of Chapman v. State of California

The question of guilt or innocence in the case at bar was manifestly not a close one. This Court is of the firm belief that the error, as conceded, was harmless beyond a reasonable doubt.

Although the invalid prior convictions were referred to on cross-examination, they were in effect merely cumulative, in that Tucker's testimony had been successfully impeached by prior inconsistent statements made to the Federal Bureau of Investigation agents, and by rebuttal testimony which demonstrated that portions of petitioner's testimony was improbable and untrue.

Tucker's testimony was successfully impeached, and, in fact, demolished by additional items:

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[18] RT 153

[19] RT 177-179

[20] RT 190

[21] RT 133

(a) He was impeached by the prior inconsistent statements he made to agent Poole that he owned the gun found prior to the robbery, and that he had never been in the First Savings and Loan Association in Berkeley.

(b) The Government's testimony of Latona and Starnes proved beyond doubt that Tucker's story about touching the cash box once while it rested on the counter was a complete fabrication.

(c) The Government's case in chief pointed unerringly to Tucker as the perpetrator of the armed robbery, and in part consisted of direct evidence supplied by four eye witnesses to the robbery, each of whom had a clear and unobstructed view of the robber.

It should be manifest that Tucker's testimony was contradicted by convincing and extensive evidence offered and introduced by the prosecution.

The use of the prior convictions did not infect the trial proceedings so as to result in a miscarriage of justice, and there is no reasonable possibility that the error complained of contributed to the ultimate conviction.

The Court concludes that the foregoing references, together with a review of the trial transcript, represent a compelling showing justifying the finding that the claimed error was harmless beyond a reasonable doubt. Cf. In re Dabney, 71 A.C. 1, 76 Cal.Rptr. 636, 452 P.2d 924, wherein Mr. Justice Tobriner, Associate Justice of the Supreme Court of California, in referring to Burgett v. State of Texas, supra, said:

> We do not believe that the Supreme Court's description of the error as inherently prejudicial means that it can never be found "harmless beyond a reasonable doubt" within the meaning of *Chapman*, for the court apparently applied the *Chapman* test in *Burgett*. It did not state that because the error was inherently prejudicial it could never be deemed harmless, but instead stated that the error was inherently prejudicial and that "we are unable to say that the instructions to disregard it made the constitutional error 'harmless beyond a reasonable

doubt' * * *." It did not foreclose the possibility that on another record presenting different facts it could conclude that such error was harmless. By describing the error as inherently prejudicial, the court may have meant only that such error is always to some extent harmful by reason of its essential character and is therefore different from error in the admission of other unconstitutionally obtained evidence that is not always harmful, such as, for example, innocent responses to an interrogation not preceded by required *Miranda* warnings. (Miranda v. State of Arizona (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 [10 A.L.R.3d 974].) In this sense of 'inherently,' used as descriptive of the essential character of the error, commenting on a defendant's failure to testify is also inherently prejudicial. (See Griffin v. [State of] California (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106.) Such error, however, may be found harmless under *Chapman*. Accordingly, we adhere to our holding in People v. Coffey, supra '[67 Cal.2d 204, 60 Cal.Rptr. 457, 430 P.2d 15,] that the introduction into evidence of an unconstitutional prior conviction is not prejudicial per se and therefore does not necessarily effect reversible error. Both the court's language in *Burgett* and the background provided by *Spencer* [v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606,] make clear, however, that only the most compelling showing can justify finding such error harmless beyond a reasonable doubt.

Retroactivity

There are two elements necessary to establish before the error herein may be regarded as reversible. First, that the error was not harmless within the standards of Chapman v. State of California, supra; and second, the rule must be regarded, within legal contemplation, as retroactive.

In view of the Court's express finding that the error complained of by petitioner resulted in harmless error, it is unnecessary to pass upon the issue of retroactivity.[22]

Accordingly, it is ordered that this petition for relief pursuant to 28 U.S.C. § 2255 must be, and hereby is,

Denied.

[22] The issues arising under the rationale of Burgett v. State of Texas, supra, are presented in the "Petition for Rehearing and Suggestion of the Appropriateness of a Rehearing En Banc" in Shorter, Appellant, v. United States of America, Appellee, 412 F.2d 428, pending in the United States Court of Appeals for the Ninth Circuit (Cf. dissenting opinion of United States District Judge, Roger D. Foley, Jr., in Shorter v. United States, 412 F.2d 431, May 6, 1969).

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 24839

FORREST S. TUCKER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

(September 28, 1970)

Appeal from the United States District Court for the Northern District of California

Before HAMLEY and MERRILL, Circuit Judges, and THOMPSON, District Judge [1]

HAMLEY, *Circuit Judge:* Forrest S. Tucker appeals from a district court order denying his motion, made under 28 U.S.C. § 2255, to vacate the judgment convicting him of armed robbery and to set aside the sentence based thereon. The judgment and sentence of imprisonment for twenty-five years, entered on May 20, 1953, was affirmed by this court in *Tucker* v. *United States*, 214 F. 2d 713 (9th Cir. 1954). The district court opinion now under review in this section 2255 proceeding is reported in 299 F. Supp. 1376 (N.D. Cal. 1969).

After Tucker had testified in his 1953 trial for the armed robbery, the Government introduced evidence of his three prior felony convictions. This evidence was received for the purpose of impeaching Tucker's own testimony offering an alibi defense. In addition, after the jury had entered its verdict of guilty, the trial judge called for further information, in the form of a Federal Bureau of Investigation report concerning Tucker's prior convictions, for use in determining the sentence to be imposed.

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[1] The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

On June 10, 1966, the Superior Court of Alameda County, California, in case No. 25,174, set aside two of Tucker's prior convictions on the ground that "the defendant was neither advised of his rights to legal assistance nor did he intelligently and understandingly waive this right to the assistance of counsel." The Government concedes that these two prior felony convictions were invalid under *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963).

In this section 2255 proceeding Tucker argues that his 1953 conviction is invalid, under the rule of *Burgett* v. *Texas*, 389 U.S. 109, 115 (1967), because his prior uncounseled convictions were used at his trial to impeach his credibility and to influence the court in imposing sentence.

> In *Burgett*, the Supreme Court stated that "[t]o permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case." 389 U.S. at 115.

This rule is being applied retroactively by this court and other court of appeals which have had occasion to consider the problem.[2]

The *Burgett* rule against the use of uncounseled convictions to prove guilt or enhance punishment precludes the use of such evidence to impeach a defendant's credibility as a witness. *Gilday* v. *Scafati*, ___ F. 2d ___ (1st Cir. 1970).[3]

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[2] See *Tucker* v. *Craven*, 421 F.2d 139 (9th Cir. 1970; *Gilday* v. *Scafati*, —— F.2d —— (1st Cir. 1970); *Smith* v. *Crouse*, 420 F.2d 373 (10th Cir. 1969); *Losieau* v. *Siegler*, 406 F.2d 795 (8th Cir. 1969); *Williams* v. *Coiner*, 392 F.2d 210 (4th Cir. 1968). The *Gilday* opinion contains a good statement of the reasons why *Burgett* should be applied retroactively.

[3] The question of whether *Burgett* precludes use of a prior conviction, invalid under *Gideon* v. *Wainwright*, to impeach a defendant's testimony in a subsequent trial on another charge, was argued in this court in *Shorter* v. *United States*, 412 F.2d 428 (9th Cir. 1969). However, in that case we did not decide the question because it was the defendant, and not the prosecution, who offered the evidence pertaining to a prior conviction.

We are also in agreement with the further ruling in *Gilday*, for the reasons there stated, that the reception of evidence pertaining to prior convictions, constitutionally erroneous under *Burgett* may, under the circumstances of a particular case, be harmless beyond a reasonable doubt, applying the principle announced in *Chapman* v. *California*, 386 U.S. 18, 24 (1967). Under *Chapman*, an error of constitutional proportions can be disregarded as harmless if the prosecution proves beyond a reasonable doubt that the error "did not contribute to the verdict obtained." 366 U.S. at 24.[4]

The nature of defendant's testimony at the trial, and the overwhelming weight of the testimony to the contrary are fully described in the district court opinion, 299 F. Supp. 1376, at 1377-1378. We agree with the district court that defendant's testimony was completely discredited by evidence other than that pertaining to the prior convictions. This leads us to conclude that the prosecution firmly proved that the evidence of prior convictions did not contribute to the verdict obtained and that, with respect to the verdict of guilty, the error in receiving such evidence was therefore harmless beyond a reasonable doubt.

As noted above, the evidence pertaining to Tucker's prior convictions was submitted not only to affect his credibility as a witness, but also to assist the trial court in fixing the sentence. The twenty-five year prison sentence imposed following Tucker's conviction for armed robbery, in violation of 18 U.S.C. § 2113(a) and (d), was the maximum allowable under the statute.

There is a reasonable probability that the defective prior convictions may have led the trial court to impose a heavier prison sentence than it otherwise would have imposed. Therefore, as to the sentencing, we are unable

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[4] The *Chapman* court stated that there is little, if any, difference between this statement of the governing principle, and the statement in *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963) that "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *See also, Harrington* v. *California*, 395 U.S. 250 (1969).

to conclude that the reception of such evidence was harmless beyond a reasonable doubt.

Accordingly, the judgment of conviction is affirmed, but the cause is remanded to the district court for resentencing without consideration of any prior convictions which are invalid under *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

THOMPSON, D.J., Dissenting:

I respectfully dissent. This Court has not yet held that the rule of *Burgett* v. *Texas*, 389 U.S. 109 (1967), is applicable to constitutionally infirm convictions used for impeachment. This is the case in which it should be declared that a convicted person cannot attack his conviction on the ground that a constitutionally infirm prior conviction was used for impeachment. This Court has not yet held that the rule of *Burgett* v. *Texas*, *supra*, applies to invalidate a sentence where a constitutionally infirm prior conviction was called to the attention of the sentencing judge by presentence report, or otherwise, before sentence was imposed. This is the case in which it should be declared that a convicted defendant cannot attack the sentence imposed by showing that the sentencing judge was informed about a constitutionally infirm prior conviction.

This writer cannot believe that the Supreme Court intended such a broad interpretation and application of the *Burgett* rule. Viewed realistically, it means that the most hoary and ancient of the confirmed, repetitive recidivists may, by applying the "domino theory" whereby the earliest of the convictions is declared void by application of *Gideon*,[1] fell each of the ensuing convictions and establish a clean unsullied record of pro-social conduct.

It has been a fundamental of our case-made jurisprudence that the principles announced in pertinent precedent should be viewed and interpreted in the light of the facts of the particular case. This is a salutary principle which this writer believes has not been entirely

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[1] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

abandoned in contemporary jurisprudence. The principle recognizes the problems inherent in communication and expression, the difficulties of achieving pinpoint accuracy and the non-existence of words expressing exactly the same concept for the writer and the reader, the speaker and the listener. It recognizes the human frailty of inability of conceive, imagine and anticipate the applications which will be sought to be made of an announced principle, howsoever accurately expressed with semantic exactness. The principle also recognizes that judges are human beings and writing in favor of a position taken, however dispassionately, may become somewhat polemic in supporting the soundness of the decision advocated. This writer admires the genius of our system which contemplates a case by case review under differing sets of facts of the principles formulated and articulated in earlier precedents.

The majority opinion is based upon the following quotation from *Burgett* v. *Texas, supra.*

> To permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense (see *Greer* v. *Beto*, 384 U.S. 269) is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.

The majority relies upon *Gilday* v. *Scafati*, —— F. 2d —— (1st Cir. 1970), where the First Circuit said:

> We conclude that the Burgett rule against use of uncounselled convictions "to prove guilt" was intended to prohibit their use "to impeach credibility," for the obvious purpose and likely effect of impeaching the defendant's credibility is to imply, if not prove, guilt. Even if such prohibition was not originally contemplated, we fail to discern any distinction which would allow such invalid convictions to be used to impeach credibility. The absence of coun-

> sel impairs the reliability of such convictions just as much when used to impeach as when used as direct proof of guilt. Moreover, such use compounds the original denial of the constitutional right just as surely as does use "to prove guilt or enhance punishment." Finally, defendant's privilege to testify or not to testify—*Griffin* v. *California*, 380 U.S. 609, 614 (1965)—is seriously impaired if the price of testifying is the potential admission of invalid and possibly unreliable convictions which could not otherwise be admitted. We therefore hold that Burgett prevent the use of uncounseled convictions for purposes of impeachment.

I think the First Circuit and the majority of this Court rely on a too literal reading of the *Burgett* opinion in disregard of the principle I have urged that we should look to the facts and to what actually was decided. Narrowly, the holding of the *Burgett* case is that if void prior convictions are brought to the attention of the jury by the prosecution in a one-stage recidivist trial, the result is a denial of due process. In that situation, inasmuch as the enhancement of punishment is directly dependent upon the validity of the prior conviction, it is the absolute duty of the prosecution to assure itself of that validity.

My interpretation of *Burgett* is that the words "support guilt" refer to the situation where the prior conviction is an essential element of the crime charged. For examples, under federal law, it is unlawful for a felon to transport a firearm in interstate commerce (18 U.S.C. § 922) and under California law, it is an offense for a felon to come upon the grounds of a reformatory in the nighttime (CPC § 171(b)). In such cases, the status or condition of having suffered the prior felony conviction is essential to support the conviction and the prosecution, quite properly, is not permitted to rely upon a void conviction to establish such status. And when the prior conviction is "used against a person * * * to enhance punishment for another offense," the Supreme Court, in my view, was alluding to recidivist statutes like the one

involved in *Burgett* and like the Narcotics Drug Import and Export Act (21 U.S.C. § 174) and like the California Habitual Criminal Statute (CPC § 644). This is as far as I would now go in the application of *Burgett*, reserving, nevertheless, deference to the policy that it is worthwhile to consider future applications of the principle on a case-by-case basis.

In the present case, two prior felony convictions were used to impeach defendant at his federal armed robbery trial. These later turned out to be vulnerable under the *Gideon* principle. It is my thesis that this fact does not justify or support an attack upon the federal conviction. It seems to me that the position of the Majority. "[T]he Burgett rule against the use of uncounseled convictions to prove guilt or enhance punishment precludes the use of such evidence to impeach a defendant's credibility as a witness," constitutes an unwarranted extension of the *Burgett* decision and will involve state and federal courts in a morass of fruitless inquiry into the undiscernable prejudicial effect of such impeachment upon the trial as a whole. Further, the majority *sub silentio* overrules two decisions of this Court, *Bloch* v. *United States*, 238 F. 2d 631 (1956), and *Bloch* v. *United States*, 226 F. 2d 185 (1955), where the Court, in the first opinion, saw no error in a felony impeachment question asked by a prosecutor who knew the prior conviction was on appeal, and in the second affirmed the ruling despite the fact that the prior conviction had been reversed on appeal. Our Court there recognized that what really was in issue was the good faith of the prosecutor and that his use in good faith of a vulnerable prior conviction to impeach the defendant could not be relied upon to reverse the conviction. The same principle should be followed in the present case.

Moreover, I see no federal constitutional problem where the issue is properly analyzed as one of the prosecutor's good faith.

On the question of sentence, the factors involved are even more imponderable. The majority thinks the imposition of the maximum sentence shows that the priors were used to enhance sentence. In my experience, so

many factors affect the imposition of sentence that I cannot accept the premise. There never will be a case where a post-conviction remedy court will be a able to tell whether knowledge of one or more prior convictions affected the sentence unless the sentence given was mandated by statute so that the prior record could have no effect. In the present case, the sentencing judge conducted an extensive colloquy before imposing sentence. A portion is copied in the margin.[2] There is more, but

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[2] "The COURT. How old were you when you first suffered a conviction—17?

"The DEFENDANT. Yes, sir.

"The COURT. These cases carry heavy penalties. You knew that when you started these enterprises, didn't you?

"The DEFENDANT. I understand it does carry a heavy penalty.

"The COURT. Do you know the reason underlying it?

"The DEFENDANT. Yes, sir.

"The COURT. There is no room for the Court to entertain elements of great sympathy because you were armed on the occasion in question and you probably would have shot, had the occasion arose.

"The DEFENDANT. I have never been known to strike anybody, shoot anybody or harm anybody.

"Mr. KARESH. Could I ask the agent a question? Is there any evidence of violence in the past criminal record—I don't mean the bank robberies—any of these larcenies that you know of?

"The WITNESS. No, there is no actual shooting or anything of that nature.

"The COURT. How long has this association with Rick Bellew been going on, since 1951 and '52?

"The WITNESS. That would be my impression, but I believe they probably met first in the Louisiana penitentiary. Now then at the time that I interviewed Tucker, he told me that he first met Bellew in 1938, out here in California, and naturally later when we found out that he had served—he was serving a sentence down there, that that probably was not the truth, and I would say that after he left the Louisiana penitentiary, he probably did not see Bellew again until somewhere in December of 1950 or January of '51, because prior to that, Bellew was incarcerated in the California penitentiary. I believe that he was paroled out of the penitentiary somewhere around the latter part of 1950, and since that time I would say that he has associated with Bellew—but just how much, or whether it was social or just along with these various activities, I couldn't say.

[Footnote continued on page 53]

it seems to me to be a fair analysis that the sentencing judge was influenced primarily by defendant's proneness to violence and the number of other outstanding charges

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[2] [Continued]

"The COURT. Without disclosing whatever evidentiary matter might be at hand, does the defendant appear to be linked in more than several local felonies involving banks or loan companies?

"The WITNESS. I would say this, that on the local loan companies in the Oakland Area—

"The COURT. What kind of loan companies are they?

"The WITNESS. Well, they are like the Personal Finance Company, Guarantee Finance Company, loan companies of that nature. And I would say that the evidence against him is very similar, in effect, of what was presented here, on those particular cases.

"The COURT. Do [you] have fingerprint testimony and the like?

"The WITNESS. I believe that there is, yes.

"The COURT. I take it you do not present these cases—you did not present these cases until you determined the fate of this particular case, is that the problem involved?

"The WITNESS. Well, these particular cases I am talking about are local—they are under the jurisdiction of the local police department and there is no Federal jurisdiction. Now I understand the District Attorney's office in Alameda County is waiting. What action they are going to take, I don't know.

"The COURT. I assume that whatever sentence is meted out to the defendant in the case at bar will be considered in connection with the prosecution or absence of prosecution of those cases.

"The WITNESS. I believe so.

"The COURT. All right, Do you have anything further?

"Mr. KARESH. No, Your Honor. Perhaps just one remark, that he did not strike anyone or shoot, did not hit anyone.

"The COURT. There is one count in the indictment?

"Mr. KARESH. Yes, Your Honor.

"The COURT. Under which the defendant Forrest Silva Tucker has been found guilty. The Jury in its Findings has indicated that the defendant did knowingly, willfully and unlawfully put in jeopardy the lives of the aforenamed employees of the Loan Association by the use of a dangerous weapon, to wit, a hand gun. Under such circumstances, Subdivision 2113(d) is applicable, providing for the term of 25 years.

"Accordingly, Forrest Silva Tucker, are you ready for sentence?

"The DEFENDANT. I am.

"The COURT. It is the judgment and sentence of this Court that you will be confined in a Federal penitentiary for the term of 25 years.

"That is all."

than anything else.[3] It is not uncommon in my experience for a sentencing judge to take into consideration other charges pending (many times detainers have been placed for them) in enhancement of punishment and for other prosecuting officials to drop charges if a sufficiently substantial sentence is imposed. It is not even unusual for a defendant against whom a number of detainers have been lodged to request a substantial sentence with the hope that the other charges will be dropped. On the present record, it is pure speculation that the invalidated prior convictions had an effect on the sentence.

Finally, I would like to suggest that when we consider the use of prior convictions for impeachment or when they are included in a pre-sentence presentation as part of the defendant's prior history, it is not the conviction—the formality of conviction—that is important. It is the conduct that is represented by the conviction. The witness' veracity is not impeached by the conviction. The conviction is only shorthand for the impeaching misconduct, and a rule of convenience has been adopted which permits impeachment by the shorthand method but prohibits it by showing other acts of misconduct, else the trial would be led into endless by-ways and side controversies. Invalidating the prior conviction does not erase the conduct on which it was based. This is even clearer in the field of sentencing where a competent presentence report does not simply recite the prior criminal record but describes the circumstances of each charge—even those that led to an acquittal. It is this history that influences the sentencing judge, not the formal convictions. For example, in a recent case the defendant had been acquitted of the charge of murdering his mother. It, nevertheless, was proper for the sentencing judge to consider that incident where a loaded weapon was involved as bearing on defendant's proneness to violent activity. And in the present case, the

[3] My quotation from the sentencing colloquy is not to suggest that I think this post-conviction remedy court has a problem which warrants trying to dissect the mind of the sentencing judge. I merely wish to picture the kind of swamp we are getting ourselves bogged down in.

judge took into consideration conduct which had not yet been prosecuted to conviction—showing that it is the conduct, not the conviction, which is relevant. Many times the circumstances of a prior conviction will cause a court to discount and disregard it completely in imposing sentence.

These are additional reasons in support of my conclusion that the *Burgett* rule should be applied only where the formal record of conviction of a felony is essential to support guilt or to enhance punishment.

In the context of the foregoing, perhaps my earlier statement that the majority relies on a too literal reading of the quotation was incorrect. There the emphasis was on "support guilt" and "enhance punishment." But if the statement of principle in *Burgett* is read with strict literalness and the emphasis is placed on "to permit a *conviction* * * * to be used," then my conclusion, that it is the required use of the formal record of conviction to attain the result under attack that is important, is clearly correct.

The majority's treatment of the problems in this appeal is based on the necessary assumption that a federal constitutional issue of fair trial and due process of law is present whenever a jury or court is informed about a defendant's prior criminal record. Yet the decisions of the Supreme Court specifically refute this assumption: *Spencer* v. *Texas*,[4] 385 U.S. 554 (1967), where the procedure of a one-stage recidivist trial was affirmed; *Rundle* v. *Johnson*, 386 U.S. 14 (1967), where the procedure of admission of prior crimes in a one-stage murder trial

[4] "It is contended nonetheless that in this instance the Due Process Clause of the Fourteenth Amendment requires the exclusion of prejudicial evidence of prior convictions even though limiting instructions are given and even though a valid state purpose—enforcement of the habitual-offender statute—is served. We recognize that the use of prior-crime evidence in a one-stage recidivist trial may be thought to represent a less cogent state interest than does its use for other purposes, in that other procedures for applying enhancement-of-sentence statutes may be available to the State that are not suited in the other situations in which such evidence is introduced. We do not think that this distinction should lead to a different constitutional result."

to assist the jury in fixing punishment was affirmed. These decisions, viewed in association with *Burgett*, suggest that the broad application of the *Burgett* rule to impeachment evidence and sentencing information is not warranted and not intended. Cf. *United States* v. *Fay*, 409 F. 2d 564 (2nd Cir. 1969). While reference to dissenting opinions in support of a contention is apt to invoke ridicule, I believe the succinct dissent of three Justices in *Burgett* v. *Texas*, 389 U.S. 109 at 120, to be pertinent:

> The record in this case shows no prosecutorial bad faith or intentional misconduct. To the extent that the prosecutor contemplated the use of prior convictions in a one-stage recidivist trial, his right to do so is of course established by *Spencer* v. *Texas*, 385 U.S. 554, decided only last Term. The fact that the prior convictions turned out to be inadmissible for other reasons involves at the most a later corrected trial error in the admission of evidence. We do not sit as a court of errors and appeals in state cases, and I would affirm the judgment of the state court.

This approach to the problems reminiscent of the attitude of our Court in the *Bloch* cases, supra, although it was rejected by the majority of the Supreme Court in a true recidivist trial where the void prior conviction was an essential of the prosecutor's case, may nevertheless be revived to control judicial review in peripheral applications of the *Burgett* rule like the uses of it in this case.

I would affirm the District Court.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 24839

FORREST S. TUCKER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

JUDGMENT

APPEAL from the United States District Court for the Northern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed and that this cause be and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

Filed and entered Sept. 28, 1970.

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

Dept. No. 2; No. 25174

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF

v.

FORREST SILVA TUCKER, DEFENDANT

FINDINGS AND JUDGMENT OF COURT

On June 10, 1966 a hearing having been had before the above-entitled Court without a jury and evidence having been received as to the first prior conviction contained in the indictment, to wit, that on or about August 9, 1938 in the Circuit Court, Dade County, Florida, defendant was convicted of the felony of grand larceny and that in pursuance of said conviction served a term in a penal institution, and as the second prior conviction contained in the indictment, to wit, that on or about November 22, 1946 in the District Court, Orleans County, Louisiana, defendant was convicted of the felony of burglary and that in pursuance of said conviction served a term in a penal institution.

The Court hereby finds as to said first prior conviction and as to said second prior conviction that said Forrest Silva Tucker was not then and there informed of his right to the assistance of counsel and that said Forrest Silva Tucker did not then and there effectively waive his constitutional right to be represented by counsel.

NOW THEREFORE, it is ordered adjudged and decreed that the verdicts of the jury in the above-entitled cause filed on November 27, 1953 finding said first prior conviction and said second prior conviction to be true are vacated and set aside and said prior convictions contained in the indictment are dismissed.

It is further ordered, adjudged and decreed that the adjudication of December 2, 1953 that the above-named

defendant is an habitual criminal under subdivision a of Section 644 of the Penal Code of the State of California be and it is hereby set aside; said judgment of December 2, 1953, as modified by the District Court of Appeal of the State of California in and for the First Appellate District, Division Two thereof (People vs Forrest Silva Tucker: 127 Cal. App. 2d 436), shall otherwise remain in full force and effect.

Dated: June 10, 1966.

LEONARD DUDER
Judge of the Superior Court

SUPREME COURT OF THE UNITED STATES

No. 1389, October Term, 1970

UNITED STATES, PETITIONER

vs.

FORREST S. TUCKER

ORDER ALLOWING CERTIORARI

Filed May 3, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 441261 106